

Arch A. Moore, Jr.
Governor



David K. Heydinger, M.D.
Director

State of West Virginia

DEPARTMENT OF HEALTH
CHARLESTON 25305

NOTICE OF AGENCY APPROVAL

LEGISLATIVE RULE: Methods and Standards for Chemical Test for Intoxication, West Virginia Board of Health Legislative Rule, Chapter 16-1, Series 10, 1986. The attached legislative rule constitutes the official rule approved by the Board of Health on the 18th day of April, 1986 and filed pursuant to law with the West Virginia Secretary of State and the Legislative Rule-Making Review Committee.

David K. Heydinger, M.D.
David K. Heydinger, M.D.
Director of Health

FILED
1986 JUL 17 PM 3:10
OFFICE OF THE SECRETARY OF STATE

FISCAL NOTE FOR PROPOSED RULES

FILED

NOV 15 PM 2:51

Rule Title: Methods and Standards for Chemical Test for Intoxication

DEPARTMENT OF STATE

Type of Rule: Legislative Interpretive Procedural

Agency Health Department Address 1800 Washington Street, East
Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$ 0	\$ 0	\$ 0
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates.

Proposed rule amendments will not affect the Health Department's cost of administering this program.

3. Objectives of these rules: The proposed rule amends the present methods and standards related to chemical tests for intoxication pursuant to Chapter 17C, Article 5C of the West Virginia Code related to driving while under the influence of alcohol, controlled substances or drugs.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

See B, below

B. Economic Impact on Political Subdivisions; Specific Industries;
Specific groups of citizens.

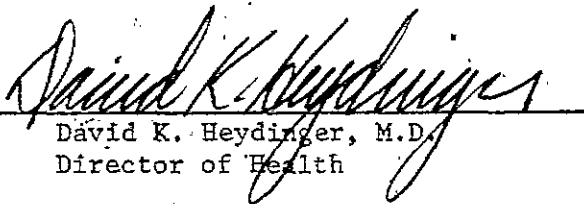
There will be some slight increase to state and local law enforcement agencies resulting from the implementation of procedures for assuring the accuracy of testing devices.

C. Economic Impact on Citizens/Public at Large.

Improved prosecution of charges of driving while under the influence of alcohol, controlled substances or drugs will result in an unknown savings to the public of life and costs associated with accidents.

Date November 14, 1985

Signature of Agency Head or Authorized Representative


David K. Heydinger, M.D.
Director of Health

WEST VIRGINIA BOARD OF HEALTH
RULE ABSTRACT

FILED

1985 NOV 15 PM 2:51

TITLE: Methods and Standards for Chemical Test for Intoxication

NUMBER: 16-1, Series 10, 1986

TYPE: Legislative

AUTHORIZING CODE: 16-1-7

RELATED CODE: 17C-5-2 et seq

SCOPE: This rule establishes methods and standards related to chemical tests for intoxication pursuant to Chapter 17C of the West Virginia Code related to driving while under the influence of alcohol, controlled substances or drugs.

APPLICATION: This rule applies to law enforcement officers, and to persons suspected to be driving a motor vehicle while intoxicated.

ABSTRACT: The proposed rule amends the present rule as follows: A definition section is added. Language related to procedures for testing devices is clarified. The rule is changed for purposes of consistency with statutory changes which have occurred since the rule was promulgated (§§3.2 and 6.1). These amendments are proposed in response to requests from various law enforcement agencies and prosecuting attorneys to clarify and modify certain portions of the present rule which present difficulties of interpretation and administration. A few additional technical changes have been made.

CONTACT PERSON: Kay Howard, Regulatory Services Division, 348-3223.

RESPONSIBLE DIVISION: State Hygienic Laboratory, Dr. John Brough,
Director, 348-3530

[PROPOSED]

WEST VIRGINIA BOARD OF HEALTH
LEGISLATIVE RULES

Methods and Standards ~~Relating to Implied Consent~~ for
Chemical Test for Intoxication

Chapter 16-1
Series 10
1986

For Filing With the
Legislative Rule-Making Review Committee

1986 JUL 17 PM 3:10
OFFICE OF THE CLERK
SECRETARIAT OF STATE

FILED

[PROPOSED]

WEST VIRGINIA BOARD OF HEALTH
LEGISLATIVE RULES

Methods and Standards ~~Relating to Implied Consent~~ for
Chemical Test for Intoxication

Chapter 16-1
Series 10
1986

INDEX

	PAGE
Section 1. General	1
Section 2. Application and Enforcement	1
<u>Section 3. Definitions</u>	2
Section 4. Preliminary Breath Analysis; Designation of Testing Device; Compliance with Methods and Standards Required	2
Section 5. Breath Analysis; Preliminary Breath Test; Standards and Methods	3
Section 6. Designation of Secondary Test; Compliance with Methods and Standards Required; Certification of Law Enforcement Officers Required	4
Section 7. <u>Breath- Analysis - Secondary- Breath- Test- - Standards- and Methods- Breath Analysis; Secondary Breath Test; Standards; Accuracy Inspection Tests; Methods</u>	5
Section 8. Blood Analysis; Standards and Methods	7
Section 9. Urine Analysis; Methods and Standards	8
Section 10. Severability	9

[PROPOSED]

WEST VIRGINIA BOARD OF HEALTH
LEGISLATIVE RULES

Chapter 16-1
Series 10
1986

Title: Methods and Standards Relating to Implied Consent for Chemical Test for Intoxication

Section 1. General

1.1. Scope - ~~These~~ This legislative rules establishes the methods and standards relating to implied consent for chemical test for intoxication pursuant to appropriate articles of Chapter 17C of the West Virginia Code. ~~of 1931, as amended.~~

1.2. Authority - ~~These~~ This legislative rules are is issued under the authority of Chapter 16, Article 1, Section 7, and are is related to Chapter 17C, Article 5, Section 2 et seq of the West Virginia Code ~~of 1931, as amended.~~

1.3. Filing Date -

1.4. Effective Date -

1.5. Supersession and Repeal of Former Regulations - ~~These~~ This legislative rules supersedes and repeals West Virginia department of health, Chapter 16-1, Series V4 (1968) entitled, Methods Standards- Relating to Chemical Test for Blood Alcohol Consent Law effective July 1, 1975. Methods and Standards Relating to Implied Consent for Chemical Test for Intoxication, West Virginia Board of Health Legislative Rules, Chapter 16-1, Series X, 1983.

Section 2. Application and Enforcement

2.1. Application - ~~These~~ This legislative rules shall apply to law enforcement officers herein defined and shall be limited to as follows: a member of the State department of public safety; any sheriff or deputy sheriff of any county; or a any member of a municipal police department in any Class 1, Class 4, or Class 44 city municipality as defined in Chapter 8, Article 1, Section 2 of the West Virginia Code; and to those persons suspected to be driving a motor vehicle while intoxicated. as hereinafter defined. Provided, however, that a member of a police department in any class IV city may administer the preliminary breath test in accordance with the methods and standards of these regulations and in accordance with Chapter 17C-5-5 of the West Virginia Code of 1931, as amended. The classification of municipal corporations shall be in accordance with the provisions of Chapter 8, Article 1, Section 3, of the West Virginia Code of 1931, as amended.

2.2. Enforcement - The enforcement of these this legislative rules is vested with the director. ~~of the West Virginia department of health or his lawful designee.~~

Section 3. Definitions

3.1. Accuracy Inspection Test - A test conducted by a certified breath test operator to determine the performance of each breath testing instrument in accordance with the procedures set forth in Section 7.2 of this rule.

3.2. Alcohol Breath Analysis - Chemical testing of a sample of a person's expired breath, using a breath test device designed for this purpose, in order to determine the concentration of ethyl alcohol in the person's blood.

3.3. Chemical Test or Testing - Analysis performed on a biological material, including, but not limited to breath, blood, or urine, to determine the identity or concentration, or both, of particular constituents such as alcohol or controlled substances. Test procedures may rely on one or more physical or chemical properties of the constituents and utilize instrumental or chemical analysis techniques to accomplish the determination.

3.4. Department - The West Virginia department of health.

3.5. Director - The director of the West Virginia department of health or his or her lawful designee.

3.6. Medical Technician - Shall include persons trained as medical technicians, emergency medical technicians or phlebotomists.

3.7. Simulator Solution - An aqueous standard ethanol solution which, when equilibrated with air in a breath simulator device, produces an air-alcohol mixture of 0.10 grams W/V that can be used to inspect or verify the accuracy of breath test devices.

3.8. Simulator Test - A testing of a sample of simulator solution vapor, using a breath test device in order to determine the accuracy of the breath test device.

3.9. W/V - Weight divided by volume.

Section 4. Preliminary Breath Analysis; Designation of Testing Device; Compliance with Methods and Standards Required

4.1. Each law enforcement agency utilizing a preliminary breath testing device shall designate such testing device for the purpose of administering a preliminary breath analysis pursuant to Chapter 17C, Article 5, Section 5 of the West Virginia Code, ~~of 1931, as amended.~~ Such designation of testing device shall be filed with the ~~West Virginia~~ department of health in a format ~~prescribed on a form provided by the department.~~

4.2. Each law enforcement agency shall comply with the methods and the standards established by ~~these regulations.~~ this rule.

4.3. The ~~West Virginia~~ department of health shall maintain a registry of approved testing devices.

4.4. All instruments utilized for the purpose of preliminary breath tests shall be approved in writing by the director.

4.5. Approvals and designations of preliminary breath testing devices in effect at the time this rule becomes effective shall continue in effect.

Section 5. Breath Analysis; Preliminary Breath Test; Standards and Methods

5.1. Instruments utilized for preliminary breath tests shall meet the following standards:

(a) The designated instrument shall be capable of the collection and the analysis of breath specimens which are essentially alveolar in composition.

(b) The instrument shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 0.01 grams percent of the true value of such reference sample.

(c) The instrument shall be periodically checked for calibration pursuant to the manufacturers instructions and in accordance with the standards of these regulations. Each law enforcement agency shall maintain a record of such calibration including the type of test employed and the date of such calibration.

(d) The instrument shall be capable of breath alcohol analysis which results in a concentration less than 0.01 grams of alcohol per one hundred (100) milliliters of blood when alcohol free persons are tested.

(e) Any instrument shall be capable, in a controlled experiment, of obtaining results which have a correlation with the results obtained through use of the secondary method.

(f) Any instrument utilized for the purpose of preliminary breath analysis shall be approved in writing by the West Virginia department of health.

5.1. The use of the approved instrument shall adhere to the manufacturer's specifications for operation and shall include any maintenance specified by the manufacturer.

5.2. The following general methods shall apply in extracting breath for preliminary breath analysis:

(a) The preliminary breath test shall be administered as soon as possible after the law enforcement officer has a reasonable belief that the person has been driving while under the influence of alcohol.

(b) Where the testing instrument requires contact with the mouth of the tested individual, the law enforcement officer conducting the preliminary breath test shall utilize an individually wrapped sterile individual disposable

mouthpiece with sputum trap for each person tested.

(c) The preliminary breath test shall be administered by a ~~qualified~~ law enforcement officer trained and certified as a secondary breath test operator with additional training, theory and practical exercise as recommended by the manufacturer. ~~Such qualification shall include as a minimum the completion of a two hour course embracing the legal aspects of breath testing, the theoretical and the practical aspects of breath testing, and the actual practical use of the testing device.~~

5.3. The results of a preliminary breath analysis shall be used solely for the purpose of guiding the officer in deciding whether an arrest should be made.

Section 6. Designation of Secondary Test; Compliance with Methods and Standards Required; Certification of Law Enforcement Officers Required

6.1. Each law enforcement agency as defined herein shall designate a type of test, either breath, blood or urine for the purpose of administering a secondary test incidental to lawful arrest for the offense of driving a motor vehicle ~~on the public streets or highways of~~ in this state while under the influence of alcohol. Such designation of the test shall be filed with the ~~West Virginia~~ department of health in a format ~~prescribed on a form provided~~ by the department.

6.2. Each law enforcement agency shall comply with the methods and the standards established by ~~these regulations;~~ this rule.

6.3. The ~~West Virginia~~ department of health shall maintain a registry of approved tests ~~for administration~~ inclusive of methods and standards for proper conduct of the tests.

6.4. Secondary test designations in effect at the time this rule becomes effective shall continue in effect.

6.45. Each law enforcement officer administering a secondary breath analysis shall be trained and certified in the procedures of operation for such testing device.

6.56. The ~~West Virginia~~ department of health shall certify each operator properly trained in the procedures of operation and shall issue a certificate to each individual so trained.

6.67. As a minimum training requirement each law enforcement officer shall have completed the Basic Training Program for Breath Examiner Specialist Course as prescribed by the United States department of transportation or an equivalent course prior to certification. Such course shall consist of classroom and laboratory training including review sessions and examinations.

6.78. Each law enforcement officer desiring certification to administer the secondary breath analysis shall apply to the ~~West Virginia~~ department of health

in a format prescribed on a form provided by the department.

6.9. Certifications of law enforcement officers in effect at the time this rule becomes effective shall continue in effect.

Section 7. Breath Analysis - Secondary Breath Test - Standards and Methods
Breath Analysis; Secondary Breath Test; Standards; Accuracy Inspection
Tests; Methods

7.1. Instrument Standards - Instruments for breath alcohol analysis shall meet the following standards:

(a) The designated instrument and any related accessories shall be capable of the collection and the analysis of breath specimens which are essentially- approach alveolar in composition.

(b) The designated instrument shall be capable of analyzing a blank sample and of analyzing a suitable reference sample simulator solution, such as air equilibrated with a reference solution of known alcohol content at a known temperature.

(c) The designated instrument shall be capable of the analysis of a reference of known alcohol concentration simulator solution within accuracy and precision limits of plus or minus 0.01 grams per centum W/V or higher.

(d) The designated instrument shall be capable, in a controlled experiment, of breath alcohol analysis which results in a determination of a person's blood alcohol concentration which has a correlation with his actual blood alcohol concentration as measured on a blood sample taken at approximately the same time as the breath sample.

(e) The instrument shall be capable of breath alcohol analysis which results in a concentration less than 0.01 grams of alcohol per one hundred ~~(+00)~~ milliliters of blood when alcohol-free persons are tested.

(f) The designated instrument shall be periodically calibrated pursuant to the standards of these regulations and the manufacturer's recommended- calibration schedule have its accuracy checked in accordance with subsection 7.2 of this rule. Each law enforcement agency shall maintain a record of such calibration- accuracy checks including the type of test employed and the date of such calibration accuracy checks. A certified copy of the record of the accuracy inspection test shall be admissible as evidence in any criminal or administrative proceeding as though the original record were offered and that the custodian had been present to testify to the record keeping process and that the individual conducting the test had been present to certify the test result.

(g) Any instrument utilized for the purpose of secondary breath analysis shall be approved in writing by the West Virginia department of health. Such instrument shall meet or exceed the standards contained herein.

7.2. Accuracy Inspection Test

7.2.1. Frequency - An accuracy inspection test shall be conducted on every test device by a certified breath test operator at least once every six months, provided, however, that all devices in use at the time this rule becomes effective shall be tested within forty-five days.

7.2.2. Procedures

7.2.2.1. An average deviation test to determine the accuracy of the instrument shall be conducted in the following manner:

- (a) A total of five tests shall be conducted.
- (b) A simulator containing simulator solution shall be used.
- (c) The results of all five tests shall be recorded in a master log which shall be kept for each certified instrument.
- (d) Test results shall be recorded to the third decimal place, if the third decimal place is available.

7.2.2.2. The breath testing device does not pass the accuracy inspection test and shall be removed from service if:

(a) One or more of the five tests yields a result less than 0.09 per cent W/V or greater than 0.11 per cent W/V; or

(b) The average deviation derived by adding the absolute values of the differences between the results of the five tests and a constant value of .10 per cent W/V and dividing the total of these absolute values by five exceeds 0.005 per cent W/V.

(c) Example of accuracy inspection test:

<u>Simulator Solution</u>	<u>Reading</u>		<u>Difference (Absolute Value)</u>
.100	.099	=	.001
.100	.104	=	.004
.100	.098	=	.002
.100	.101	=	.001
.100	.102	=	.002
	$\frac{.010}{5}$	=	.002

Average deviation = .002 and .002 is less than .005; therefore the breath test device passes the accuracy inspection test.

7.2.2.3. A breath testing device which has been removed from service for failure to pass an accuracy inspection test shall be adjusted or repaired

and undergo an accuracy inspection test prior to being placed back into service.

7.2.2.4. The certified breath test operator shall perform the procedures set forth in Subsection 7.2.2.1 in accordance with accepted standard procedures for operation specified by the manufacturer of the device.

7.23. Methods - The following general methods shall apply in extracting breath for secondary breath analysis.

(a) The law enforcement officer effectuating the arrest shall observe the individual for individual being tested shall be under constant observation for a period of twenty (20) minutes before administering the test is administered to insure that the individual has nothing in his or her mouth at the time of the test and that he or she has had no food or drink or foreign matter in his or her mouth during the observation period.

(b) The individual administering the test shall examine the designated instrument perform a simulator test to insure that it the instrument is in proper working condition at the time the test is being conducted.

(c) The test shall be administered by a certified operator and in accordance with these regulations this rule.

(d) The law enforcement officer conducting the secondary breath test shall utilize an individually wrapped sterile individual disposable mouthpiece with sputum trap for each person tested.

Section 8. Blood Analysis; Standards and Methods

8.1. Methods of analyzing blood specimens for ethyl alcohol shall meet the following standards:

(a) The method utilized shall be capable of separating and quantitating ethyl alcohol from the blood specimen.

(b) The method utilized shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 0.01 grams per centum W/V of the true value. These limits shall be applied to alcohol concentrations which are 0.01 grams per centum W/V or higher.

(c) The method utilized shall be capable of blood alcohol analysis which results in a concentration less than 0.01 grams of alcohol per one hundred ~~(100)~~ milliliters of blood when alcohol free persons are tested.

(d) The gas-chromatographic method meets the above standards for testing.

8.2. The methods of extracting blood for alcohol analysis shall be as follows:

(a) The blood shall be drawn only by a licensed doctor of medicine or osteopathy or by a registered professional nurse or by a trained medical technician at the place of their employment.

(b) Sterile hypodermic needles and syringes ~~capable of extracting ten (10)-milliliters of blood~~ shall be used. Sterile disposable units are recommended.

(c) The skin shall not be disinfected with ethyl alcohol. The use of 1-1000 aqueous solution of mercuric chloride, aqueous benzalkonium chloride (zephiran), aqueous merthiolate, or other suitable aqueous disinfectants are acceptable.

(d) The container (tube or vial) must be clean and dry, and have an inert, airtight stopper. ~~and hold at least five (5)-milliliters;~~

~~(e) An anti-coagulant, such as sodium-fluoride, citrate, or oxalate shall be used.~~

Section 9. Urine Analysis; Methods and Standards

9.1. The methods of analyzing urine specimens for ethyl alcohol shall meet the following standards:

(a) The method utilized shall be capable of separating and quantitating ethyl alcohol from the urine specimen.

(b) The method utilized shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy limits of plus or minus 0.01 grams per cent W/V of the true value. These limits shall be applied to alcohol concentrations which are 0.01 grams per cent W/V or higher.

(c) The method utilized shall be capable of urine alcohol analysis which results in a concentration less than 0.01 grams of alcohol per one hundred ~~(100)~~ milliliters of alcohol when alcohol free persons are tested.

(d) The gas-chromatographic method meets the above standards for testing.

(e) The quantity of alcohol found in the urine shall be divided by the factor of 1.3 to determine the quantity of alcohol in the blood.

9.2. The methods of extracting urine for alcohol analysis shall be as follows:

(a) The container must be clean and dry and have an inert airtight stopper ~~and hold at least ten (10)-milliliters.~~

(ba) The individual shall empty his or her urinary bladder and discard the first specimen.

(eb) Following the a twenty (20) minutes observation period as described in §9.2(c), the individual shall void a sample of his or her urine ~~in the~~ into a clean dry container provided with an inert cap. The container shall be capable of holding at least ten milliliters of urine.

(c) The law enforcement officer effectuating the arrest shall personally observe the individual for individual being tested shall be under constant observation for a period of twenty (20) minutes before the specimen for alcohol analysis is taken to insure that the individual has nothing in his or her mouth at the time that the specimen is taken and that he or she has no food or drink or other foreign matter in his or her mouth during the observation period.

Section 10. Severability - If any provisions of these rules or the application thereof to any person or circumstance shall be held invalid, such invalidity thereof shall not affect the provisions or application of these rules which can be given effect without the invalid provisions or application, and to this end the provisions of these rules are declared to be severable. The provisions of this rule are declared to be severable. If any provision of this rule shall be held invalid, the remaining provisions shall remain in effect.

Written Comments Received
for Public Hearing and Comment
December 16, 1985

Office of Prosecuting Attorney of
Jefferson County
P.O. Box 729
County Building
Charles Town, West Virginia 25414

Office of the Prosecuting Attorney
Boone County
Boone County Courthouse
Madison, West Virginia 25130

Office of the Attorney General
State of West Virginia
Charleston, West Virginia 25305

Proposed Rules
Public Comments Received
Discussion and Response

Title, Type and Number: Methods and Standards for Chemical Test for Intoxication (Amendments), West Virginia Board of Health Legislative Rules, Chapter 16-1, Series 10, 1986.

A public hearing regarding this rule was held on December 16, 1985; however, no one attended. Written comments were received from the Attorney General's Office, Boone County Prosecuting Attorney's Office and Jefferson County Prosecuting Attorney's Office. The Boone County Prosecuting Attorney wrote in total support of the proposed amendments. The Attorney General's Office and Jefferson County Prosecuting Attorney's office, while indicating support of the proposed rules, asked for minor clarifications. Changes proposed in response to comments received do not alter the intent of the rule; they are either clarifications or minor adjustments to particular standards. The Department does not believe that an additional public comment period is required.

1. Comment (Jefferson County Prosecuting Attorney's Office): Is it possible that a test can have a correct simulator solution result and the next test (6 month accuracy) obtain a result greater than .005?

Response: The same procedures are always followed when an accuracy inspection test is conducted. If a simulator solution result of greater than .005 is obtained at a later testing date the machine will have failed the test and, in accordance with §7.2.2.3, will be removed from service until it is adjusted or repaired and tested again.

Proposed: No change.

2. Comment (Jefferson County Prosecuting Attorney's Office): §3.1. This section defines the Accuracy Inspection Test; however, Section 7.2 refers to this test in different wording.

Response: We agree that the language in §3.1 and §7.2.1 is confusing. These sections will be rewritten for clarification purposes.

Proposed: §3.1. Accuracy Inspection Test - A test conducted ~~at least once every six months~~ by a certified breath test operator to determine the performance of each breath testing instrument in accordance with the procedures set forth in Section 7.2 of this rule.

§7.2.1. Frequency - An accuracy inspection test shall be conducted on every test device ~~within six months prior to using such breath test device to perform an actual alcohol breath test~~ by a certified breath test operator at least once every six months, provided, however, that all devices in use at the time this rule becomes effective shall be tested within forty-five days.

3. Comment (Jefferson County Prosecuting Attorney's Office): §7.2.2.2 and §7.2.2.4. The commentator indicated that defense attorneys are going to

argue that the procedure proposed in §7.2.2.2 be followed in every situation of a DUI arrest which is impossible. The commentor feels defense attorneys will also want the log in court and will want to know who ran the accuracy inspection test.

Response: The rule clearly states that an accuracy inspection test be conducted every six months to establish reliability of the testing instrument; we believe that this is sufficient and that more frequent testing is unnecessary. The State Police agree with the commentor that defense attorneys may want the log and the person who conducted the accuracy inspection test in court and feel this may create a problem; therefore, Section 7.1(f) has been rewritten.

Proposed: §7.1(f). The designated instrument shall have its accuracy checked in accordance with subsection 7.2 of this rule. Each law enforcement agency shall maintain a record of such accuracy checks including the type of test employed and the date of such accuracy tests. A certified copy of the record of the accuracy inspection test shall be admissible as evidence in any criminal or administrative proceeding as though the original record were offered and that the custodian had been present to testify to the record keeping process and that the individual conducting the test had been present to certify to the test result.

4. Comment (Jefferson County Prosecuting Attorney's Office): §7.2.2.4. Will the "accepted standard procedures for operators specified by the manufacturer of the device" be identified when the instrument is approved by the Health Department?

Response: The "accepted standard procedures for operators specified by the manufacturer of the device" are identified by the Department of Health when the instrument is approved.

Proposed: No change.

- 5. Comment (Attorney General's Office): §5.2(b). It is the commentor's understanding that a new form of breath testing device is now available. This device, often built into a flashlight has been used successfully in other states for preliminary tests. A feature of this device is that the tested individual does not actually have to blow into it; however, it measures a person's normal exhalations with apparently sufficient accuracy. While it is obvious that such device would have to be thoroughly tested before it could be approved for use by law enforcement officers in West Virginia it is suggested that the proposed rules should anticipate its possible use in the future. It is proposed that Section 5.2(b) be changed to read as follows:

Where the testing instrument requires contact with the mouth of the tested individual, the law enforcement officer conducting the preliminary breath test shall utilize a mouthpiece for each person tested.

Response: We agree with the comment made by the Attorney General's office and will revise §5.2(b).

Proposed: §5.2(b). Where the testing instrument requires contact with the mouth of the tested individual, the law enforcement officer conducting the preliminary breath test shall utilize an individual disposable mouthpiece for each person tested.

OFFICE OF PROSECUTING ATTORNEY OF JEFFERSON COUNTY

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November 26, 1985

Regulatory Services Division
West Virginia Department of Health
1800 Washington St., East
Charleston, W. Va. 25305

RECEIVED

NOV 29 1985

REGULATORY SERVICES
DIVISION

RE: Comment on proposed West Virginia Board of Health
Legislature Rules--Methods and Standards for
chemical Test for Intoxicator (1986)

Dear Mr. Heydinger:

In review of the stated regulations, it was noted that in the definitions that 3.1 states "Accuracy Inspection Test- A test conducted at least once every six months by a certified breath test operator. The frequency is also listed in section 7 to indicate six months accuracy testing but in different wording.

The question I have concerns State v. Hood and the requirement that the testing officer, when an alleged offense occur, ensure that the testing device or equipment was in proper working order. My concern is paragraph 7.2.2.4. In my dealings with the operators in each county, they do not know what is specified by the manufacturer of the device. Normally the officer just follows what he learned at the training course and the operational check list provided by the department. The check list does not normally state that it is the manufacturers procedure. Will the "accepted standard procedures for operators specified by the manufacturer of the device" be indentified when said instrument is approved by the Department of Health?

Defense Attorney's have been arguing that the State must prove the Health Department Regulations and that every section of it be shown to have been followed. Most operators have only a cursory knowledge that the paper check list follows Health Department requirements and have no knowledge of manufacturers specifications. I know defense attorney's are going to argue that the proposed 7.2.2.2 procedure be followed in

November 26, 1985

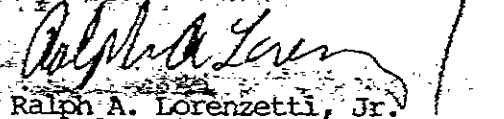
page 2
West Virginia Department of Health
Charleston, W. va. 25305

every situation of a DUI arrest, which is impossible. They will also want the log in Court, and will want to know who ran the accuracy inspection, thereby requiring the log and a listing of the operator during the tests.

Another question, is it possible (reasonably) that² test can be obtained with a correct simulator solution result, and the next test be the 6 month accuracy test and get a result greater than .005?

This comment is not meant to negate the proposed changes, but just insure that the questions are answered prior to the first trial after its implementation.

Very truly yours,



Ralph A. Lorenzetti, Jr.
Assistant Prosecuting Attorney

RAL:amf



T. R. MULLINS
PROSECUTING ATTORNEY

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PROSECUTING ATTORNEY
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RECEIVED

DEC 11 1985

REGULATORY SERVICES
DIVISION

December 11, 1985

Regulatory Services Division
West Virginia Department of Health
1800 Washington Street, East
Charleston, WV 25305

Gentlemen:

We have studied the proposed Methods and Standards for Chemical Test for Intoxication (Amendments).

In the past we have had difficulty both in administering the approved chemical tests and in interpreting to the courts the technical aspects of the procedures in which we have been trained. Practical difficulties have included the requirement that the arresting officer conduct the twenty-minute period of observation and the requirement that collection tubes of a particular size be used for the blood test. The courts have had difficulty in understanding the requirements of maintenance and calibration of breath test devices. The courts have sometimes supposed that more must be done than an operator is trained to do to guarantee the accuracy of the test.

We have discussed these and other problems on several occasions with Dr. John W. Brough. We find in studying the proposed amendments that all of the points we have raised with Dr. Brough have been addressed in the rule changes. The proposed changes are clear and understandable, the product of excellent draftsmanship. They are fair to both the prosecution and the defendant. They show a practical understanding of the mechanics of administering the chemical tests. We fully support their adoption.

December 11, 1985

Page Two

We wish to express our appreciation for the help and advice we have received from Dr. Brough. He has always been willing to assist us through the sometimes confusing process of complying with the regulations. We look forward to a continuing good relationship with Dr. Brough and your Department.

Very truly yours,



Patrick B. O'Neal
Assistant Prosecuting Attorney



Rodney A. Miller
Boone County Deputy Sheriff
Instructor and Technician,
Breathalyzer Model 2000

PBO/md

-cc: David K. Heydinger, M. D.
Director of Health
West Virginia Department of Health
1800 Washington Street, East
Charleston, WV 25305

Dr. John W. Brough
Director, State Hygienic Laboratory
West Virginia Department of Health
167 Eleventh Avenue
South Charleston, WV 25303



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

DEC 19 1985
REGULATORY SERVICES
DIVISION

CHARLIE BROWN
ATTORNEY GENERAL

December 17, 1985

Dr. David K. Heydinger
Director, Department of Health
Regulatory Services Division
Room 7, P & G Building
Charleston, West Virginia 25305

Re: Proposed Rules, Methods and Standards
for Chemical Test for Intoxication

Dear Dr. Heydinger:

I would like to voice my support for the proposed changes to the Board of Health Rules for Methods and Standards for Chemical Test for Intoxication. As counsel for the Department of Motor Vehicles, I feel the change will be very beneficial to the State's program against drunk drivers. The proposed changes clarify several important procedures for the benefit of law enforcement officers, motorists, and the courts.

There is one change I would suggest for your consideration. The first has to do with standards and methods for a preliminary breath test. It is my understanding that a new form of breath testing device is now available. This device, often built into a flashlight, has been used successfully in other states for preliminary tests. The most significant feature is that the tested individual does not actually have to blow into the device. It measures a person's normal exhalations with apparently sufficient accuracy.

While I believe such device would have to be thoroughly tested before it could be approved for use by law enforcement officers in West Virginia, I also feel that the proposed rules should anticipate the possible use of the device. Therefore, I would suggest amendment of the Rules, Section 5.2(b) as follows:

"(b) Where the testing instrument requires contact with the mouth of the tested individual, the law enforcement officer conducting the preliminary breath test shall utilize an individually

~~wrapped-sterile-individual-disposable~~ mouthpiece
~~with-sputum-trap~~ for each person tested.

I trust you will give due consideration to this suggestion.
On the whole, I feel the proposed changes in the rules are
much-needed improvements.

Sincerely,



DOREN BURRELL
ASSISTANT ATTORNEY GENERAL

DB/cln